

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 11-01754(JLL)

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KIMBERLEE WILLIAMS, et al., : TRANSCRIPT OF
Plaintiffs, : PROCEEDINGS
-vs- : September 5, 2017
BASF CATALYSTS, LLC, et al., :
Defendants. : Newark, New Jersey
- - - - -X

B E F O R E:

MAGISTRATE JUDGE JOSEPH A. DICKSON,
UNITED STATES DISTRICT MAGISTRATE JUDGE

Pursuant to Section 753 Title 28 United States Code, the
following transcript is certified to be an accurate record
as taken stenographically in the above-entitled proceedings.

s/Phyllis T. Lewis, CCR, CRCR

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1 THE COURT: Back on the record with a Magistrate
2 Judge.

3 Okay. How can I help you?

4 MR. ASSAF: Sir, your Honor, Gene Assaf on behalf
5 of BASF.

6 And while I appreciate the plaintiffs' notion that
7 maybe we can conduct more meets and confers, I think
8 regrettably we need some guidance on what a meet and confer
9 constitutes, because it seems to be different than any other
10 Federal District Court I practiced in.

11 The plaintiffs' meet and confer last time consisted
12 of not having any letters beforehand, but saying they would
13 tell us what happens on the phone.

14 We got on the phone. They read for about nine
15 minutes a prepared statement, and then much like
16 congressional committee testimony, refused to answer
17 questions and said I refer you to my prior statement that I
18 just read.

19 And then we said: Well, can we have a copy of the
20 statement?

21 And they said: We will think about it.

22 And so to me, that is not a meet and confer. If I
23 am mistaken, I am happy to learn a new way to do it. But
24 unless we can actually do things like say, do you have any
25 documents that Devon was withholding from Wygard's files

1 regarding settlements with other companies, unless we can
2 actually talk about that, then we are not going to make any
3 progress. We are just going to continue to exchange
4 letters, and I guess written statements that are read to us
5 over the phone.

6 So that is why I am saying the meet and confers, I
7 am happy to do it, but we need some guideposts as to whether
8 this is just congressional testimony and referred back to
9 the written statements.

10 Thank you, your Honor.

11 THE COURT: Mr. Placitella?

12 MR. PLACITELLA: I actually offered to meet in
13 person, to spend as much time as necessary to go over the
14 issues. You know, Mr. Assaf thinks that he dictates what
15 happens, and if he doesn't like what he hears, he writes
16 letters to the Court complaining.

17 We had a meet and confer on the phone. Yes, I did
18 read him sections, not a nine-paragraph or nine minutes. I
19 did point him to sections of Judge Linares' opinion, which
20 we thought supported our position.

21 I also indicated to him that we have a legitimate
22 difference of opinion on what was intended. It was our
23 understanding that the special discovery master would
24 resolve those issues between us.

25 I asked him specific questions about moving

1 forward. Asked him to go back and look at his privilege
2 logs or whatever and have another meeting or another phone
3 call or meet in person because that is what I thought
4 actually you were supposed to do, go meet in person with all
5 of these people and see if we can come to some resolution
6 where people aren't on the phone interrupting each other,
7 and instead he wrote me a letter.

8 So I do believe that we have satisfied our
9 obligation. Just because Mr. Assaf says here is my
10 question, answer it now, does not mean it is a legitimate
11 question and does not mean that when he gets my response,
12 and he doesn't like it, that that gives rise that he can ask
13 the question again over and over and over without me saying
14 to him, gee, I already answered that question.

15 So that is the purpose of a special discovery
16 master I thought, because if they won't meet with me in
17 person, and it has to be on the phone with all kinds of
18 people and people interrupting each other, then we will do
19 it with the special master.

20 I still hold open the offer to try to resolve the
21 things that we can resolve and to tee up for the special
22 discovery master those things that we can't resolve.

23 Because Mr. Assaf asks a question, and I tell him I
24 am on vacation, and he gets agitated because I am on
25 vacation for a week, that I didn't respond to him fast

1 enough, does not mean that I am not trying to meet and
2 confer. But, you know, it is the summer. We do try to take
3 some leisure time, although I am not very good at it, I will
4 say, but, you know, I continue to offer. I want to move the
5 case forward, but under the guidance of the Court within the
6 frame outlined by Judge Linares and the Third Circuit and
7 with the assistance of a special discovery master.

8 Thank you.

9 MR. ASSAF: Three points, your Honor.

10 As you know all too well, this case came to a
11 grinding halt for discovery. Plaintiffs took the position
12 that BASF forfeited its discovery rights, that Rule 26
13 should be read differently in this case, that the Third
14 Circuit ruled that no discovery need to take place except as
15 to the defendants, and they stopped all document
16 productions, didn't produce anything.

17 Judge Linares' opinion came out, and the meet and
18 confer as part of the written statement is that they now
19 believe that when Judge Linares' opinion, when combined with
20 the Third Circuit findings, means that they don't have to
21 produce any other documents.

22 So think about that. You lived through this for a
23 year. Their view was we didn't have to produce anything.
24 We are going to brief all of this for Judge Dickson and
25 Judge Linares. We briefed it all. With all due respect, I

1 think Judge Linares basically rejected a lot of the
2 defendants' positions on Rule 26 and what the Third Circuit
3 said.

4 And now their position is, to be clear, and he
5 could correct me, if I'm wrong on this, we are not going to
6 produce a single other document, and Judge Linares' opinion
7 means we don't have to revise our privilege lot in one
8 instance, even though Judge Linares said there is a limited
9 waiver, their view is there is no waiver.

10 In fact, they told the newspaper that Judge Linares
11 ruled in the plaintiffs' favor finding there is no waiver.

12 So, your Honor, we do. We have a significant
13 issue. I am happy to meet with Mr. Placitella. I met with
14 him in your conference room months ago, but we have not made
15 any progress, and we are not going to make any progress
16 unless somebody says Judge Linares meant what he said in his
17 opinion.

18 And, for example, the settlement documents, there
19 are collateral issues out there, did the named plaintiffs
20 settle with other talc companies.

21 That will be relevant for damages. That will be
22 relevant obviously to see what was told to them and why they
23 were settling those cases, because we now know that the
24 named plaintiff in this case settled with a talc company
25 that had asbestos in the talc and knew. She knew that, and

1 she took a thousand dollars.

2 That is certainly within the rule, within Rule 26
3 of relevance.

4 Can this lead to relevant evidence?

5 And so they say, no, we are not going to produce
6 those. There is no order from Judge Dickson requiring us to
7 produce anything. We only have this analytical framework
8 from Judge Linares. But until we get an order, we are not
9 producing anything.

10 Your Honor, I am happy to sit and talk with Mr.
11 Placitella about that, but until we get some guidance that
12 Judge Linares meant what he said, we are not going to get a
13 single document from them.

14 MR. PLACITELLA: Your Honor, I am not going to go
15 through this. I will tell you that that is not an accurate
16 description of what happened.

17 We do have a material disconnect on what the import
18 of the decision was. We are happy to discuss it at length
19 with the special discovery master, but that is not what
20 transpired between us, and I am just going to leave it at
21 that.

22 THE COURT: I don't think it is time for me to tell
23 you what Judge Linares' opinion means. If we had not had
24 the problems that we had with the two special masters that
25 have come into this case, I don't think we would be sitting

1 here today unless it was on an appeal of the special
2 master's ruling, and I just think it is not judicially
3 efficient for me to interpret the decision without having
4 actually the special master yet confirmed and solidified or
5 whatever the right word is, we are in flex a little bit.

6 So I am going to decline to do it, even though I
7 think I could shed some light on this, I just don't think it
8 is appropriate at this time for me to do that, other than to
9 say that it means discovery will go forward in this case.

10 To the extent anybody thinks there is no discovery --

11 MR. PLACITELLA: That is not what I even implied --

12 THE COURT: -- from both sides --

13 MR. PLACITELLA: All right.

14 THE COURT: -- from both sides.

15 I am going to be that ridiculously general, okay?

16 I am going to be happy -- no, I shouldn't say that
17 at all. Forget it.

18 The special master I am sure will be able to solve
19 all of your problems.

20 (Laughter)

21 MR. POLLOCK: Judge Dickson, can I ask you a
22 procedural question?

23 THE COURT: I just wanted to say one more thing
24 about meeting and conferring, and I think you both disagree
25 with what each one of you just said, which, of course, is

1 the problem we always have when we are trying to define meet
2 and confer.

3 Just as a practical matter, what happens is we,
4 Magistrate Judges, hear this problem all of the time. Maybe
5 sometimes not in quite such stark terms, but the parties
6 say, well, we tried to meet and confer, and they wouldn't
7 listen or they wouldn't respond, or they wouldn't do this,
8 or they wouldn't do that, and then we wind up, as you know,
9 asking you to go to our jury room or our conference room.

10 So, Mr. Assaf, you asked for the guidance on meet
11 and confer. It can be done over the telephone, although
12 even when I do conference calls with a lot of attorneys, I
13 kind of share Mr. Placitella's frustration with a lot of
14 people on a conference call and people starting talking, and
15 I can't tell who is saying what.

16 So in a case this big perhaps, I am not going to
17 order you to do this, but I think it would be a good idea to
18 try to meet in person. A lot of times you ask me to hear
19 from you on a regular basis. Maybe you should set up a
20 monthly meeting or bimonthly, and I am not going to dictate
21 the terms of just getting together to try to go through the
22 issues. And once you sit around the conference table and
23 can't work it out, then the special master will have an idea
24 where that needs to go, either whether he's sitting there
25 with you or whether you just letter brief it, whatever.

1 I don't have to tell you how to do this. Meet and
2 confer does not mean dictating a position, and perhaps just
3 from a practical point of view, I think in-person and
4 face-to-face meet and confer works better.

5 Is there anything else that I can really help you
6 with at this point in time?

7 MR. PLACITELLA: No, your Honor.

8 Thank you.

9 THE COURT: Mr. Assaf, what is it that you want me
10 to tell them to do?

11 In the words of Mr. Placitella, do you want me to
12 tell him just to agree with you?

13 MR. ASSAF: No.

14 THE COURT: I am being tongue in cheek. I mean
15 that for the record.

16 MR. ASSAF: That would be okay, too.

17 No, listen, I am happy to meet. In fact, I think
18 we wanted to meet, and that's fine. I am happy to meet here
19 every time for a meet and confer. I'm happy to meet in
20 person.

21 Our problem is actually getting the meet and confer
22 and then getting actually a dialog about it. So I am happy
23 to do that. In fact, I will propose that we meet in person
24 in Newark. That would be great. We will just come to the
25 courthouse or come to somebody's office here in Newark and

1 do it. That would be great. I think if that is Mr.
2 Placitella's issue, we will address that right off the bat.

3 I think, again, the SDM, the Special Discovery
4 Master, I think there are a couple outstanding issues that
5 are still hanging out there regarding disclosure issues and
6 the sanction issues, and I am assuming there are special
7 discovery master's in the first instance, not Judge Dickson
8 in the first instance.

9 THE COURT: Right now -- well, it was my
10 understanding that everything would go to the special
11 master, but I think what this needs is once we get the
12 special master issue straightened out, we have a meeting
13 with the special master.

14 If you say those are the ten issues, and you all
15 agree, or the special master recommends that I deal with any
16 of them, we will go that way. I don't want to start picking
17 and cherry picking right now.

18 MR. ASSAF: Fair enough, your Honor.

19 Thank you.

20 THE COURT: Now I have a question for you, probably
21 for you, Mr. Assaf.

22 You referred a couple of times during the hearing
23 with Judge Linares about the requirement for an affidavit,
24 and I think you said Rule 53. We are trying to figure out
25 what exactly you may be speaking of. I hate to admit it on

1 the record, but I don't know.

2 MR. ASSAF: I am looking at Rule 53 --

3 THE COURT: Is it a civil rule, a federal rule?

4 MR. ASSAF: Federal Rule of Civil Procedure 53 and
5 the commentary in the 2003 Committee Notes on Subdivision
6 (a)(2) and (a)(3).

7 THE COURT: Okay.

8 MR. ASSAF: I also think there is a affidavit in
9 the commentary to 28 USC 455, but I am not sure on that one,
10 and then the ABA opinion also makes reference to the
11 affidavit and I can get you --

12 THE COURT: The ABA opinion --

13 MR. ASSAF: -- it's ABA Opinion 07-44, dated
14 August 9th, 2007.

15 THE COURT: Okay. That it is.

16 Thank you.

17 MR. ASSAF: Thank you.

18 MR. PLACITELLA: Thank you, your Honor.

19 MR. POLLOCK: And that cites in turn to 28 USC 455,
20 that that one really cites to, then cites over to this one.

21 MR. ASSAF: Your Honor --

22 THE COURT: Off the record. We're off the record.

23 (Discussion held off the record)

24 (The matter concluded)